



CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 17-C0001]

PetSmart, Inc., Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission

ACTION: Notice

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the Federal Register in accordance with the terms of the Consumer Product Safety Commission's regulations. Published below is a provisionally-accepted Settlement Agreement with PetSmart, Inc., containing a civil penalty in the amount of four million, two hundred fifty thousand dollars (\$4,250,000) within thirty (30) days of service of the Commission's final Order accepting the Settlement Agreement.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by

[INSERT DATE 15 CALENDAR DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 17-C0001, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, Maryland 20814-4408.

FOR FURTHER INFORMATION CONTACT: Philip Z. Brown, Trial Attorney, Division of Compliance, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814-4408; telephone (301) 504-7645.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.¹

Dated: November 14, 2016.

Todd A. Stevenson,

Secretary.

¹ The Commission voted (4-1) to provisionally accept the Settlement Agreement and Order regarding PetSmart, Inc. Chairman Kaye, Commissioner Adler, Commissioner Robinson and Commissioner Mohorovic voted to provisionally accept the Settlement Agreement and Order. Commissioner Buerkle voted to reject the Settlement Agreement and Order.

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

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| In the Matter of: |) | |
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| PETSMART, INC. |) | CPSC Docket No.: 17-C0001 |
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| |) | |
| |) | |

SETTLEMENT AGREEMENT

1. In accordance with the Consumer Product Safety Act, 15 U.S.C. §§ 2051–2089 (“CPSA”) and 16 C.F.R. § 1118.20, PetSmart, Inc. (“PetSmart”), and the United States Consumer Product Safety Commission (“Commission”), through its staff, hereby enter into this Settlement Agreement (“Agreement”). The Agreement and the incorporated attached Order resolve staff’s charges set forth below.

THE PARTIES

2. The Commission is an independent federal regulatory agency, established pursuant to, and responsible for, the enforcement of the CPSA, 15 U.S.C. §§ 2051–2089. By executing the Agreement, staff is acting on behalf of the Commission, pursuant to 16 C.F.R. § 1118.20(b). The Commission issues the Order under the provisions of the CPSA.

3. PetSmart is a corporation, organized and existing under the laws of the state of Delaware, with its principal place of business in Phoenix, AZ.

STAFF CHARGES

4. Between April 2009 and September 2013, PetSmart imported and offered for sale in the United States, approximately 127,444 “Grrreat Choice” or “Top Fin” brand 1.75 gallon, brandy snifter-style glass fish bowls (“Fish Bowls” or “Subject Products”).

5. The Fish Bowls are a “consumer product,” “distribut[ed] in commerce,” as those terms are defined or used in sections 3(a)(5) and (8) of the CPSA, 15 U.S.C. § 2052(a)(5) and (8). PetSmart is an “importer,” “manufacturer” and “retailer” of the Fish Bowls, as such terms are defined in sections 3(a)(11) and (13) of the CPSA, 15 U.S.C. § 2052(a)(11) and (13).

Violation of CPSA Section 19(a)(4)

6. The Fish Bowls contain a defect which could create a substantial product hazard and create an unreasonable risk of serious injury because they can crack, shatter, or break during normal use, posing a laceration hazard to consumers.

7. Between August 2011 and January 2014, PetSmart received at least 19 incident reports of Fish Bowls cracking, breaking, or shattering during normal use, which, in at least 12 instances, resulted in serious injuries, including deep lacerations requiring stitches and severed tendons necessitating surgery.

8. PetSmart received at least three reports of consumers sustaining serious injuries during normal use of the Fish Bowls between August 2011 and September 2011 but neither initiated an investigation into the Subject Products in response to these reports of serious injury nor immediately reported to the Commission.

9. In May 2013, after receiving additional reports, including two reports of serious injuries to consumers, PetSmart initiated an investigation and evaluation of the defect and risk associated with the Fish Bowls. That investigation, which concluded in July 2013, identified deficiencies in the thickness and distribution of the glass in the Fish Bowls. During its investigation, PetSmart continued to receive reports of serious injury caused by the Fish Bowls. Firms may conduct a reasonably expeditious investigation, not normally exceeding 10 days, to

evaluate their reporting obligations. *See* 16 C.F.R. § 1115.14(d). PetSmart's investigation took over two months to complete.

10. PetSmart stopped sale of the Fish Bowls in September 2013. At the time PetSmart stopped sale of the Fish Bowls, PetSmart had received at least 12 reports of consumers being injured during normal use of the Subject Products.

11. PetSmart did not file a Full Report with the Commission until January 31, 2014, pursuant to 15 U.S.C. § 2064(b). PetSmart and the Commission jointly announced a recall of 10,200 Fish Bowls on April 24, 2014.

12. PetSmart's Full Report contained information on only 10,211 Fish Bowls imported and sold between February 2013 and September 2013. However, information produced by PetSmart during staff's civil penalty investigation revealed that PetSmart had actually sold a total of 91,500 Fish Bowls between March 2010 and September 2013 that posed the same laceration hazard. PetSmart and the Commission jointly announced an expanded recall of 91,500 Fish Bowls on November 17, 2015.

13. By the date of the expanded recall, PetSmart received at least 32 reports of Fish Bowls cracking, breaking or shattering during normal use, including 18 reports of injury. PetSmart received at least six of these reports of injury after the first recall.

14. Despite having information that the Fish Bowls contained a defect and created an unreasonable risk of serious injury, PetSmart did not notify the Commission immediately of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. § 2064(b)(3) and (4), in violation of section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4).

15. Because the information in PetSmart's possession constituted actual and presumed knowledge, PetSmart knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. §

2068(a)(4), as the term “knowingly” is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

16. Pursuant to Section 20 of the CPSA, 15 U.S.C. § 2069, PetSmart is subject to civil penalties for its knowing violation of section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4).

Violation of CPSA Section 19(a)(13)

17. PetSmart’s January 31, 2014 Full Report identified the Subject Products as 10,211 Fish Bowls, sold between February 2013 and September 2013, which posed a laceration hazard to consumers. The Full Report did not identify an additional 81,300 units of Subject Products that were sold prior to February 2013 that posed the same hazard and had been the subject of incident and injury reports received by PetSmart.

18. By failing to identify the correct amount and distribution dates of the Subject Products in PetSmart’s Full Report, PetSmart knowingly misrepresented the scope of consumer products subject to an action required under section 15 of the CPSA. As a result of PetSmart’s misrepresentation, the April 24, 2014 CPSC press release announcing the recall inaccurately stated that “[a]bout 10,200” Fish Bowls were affected by the hazard posed by the Fish Bowls. An expansion of the recall was announced on November 17, 2015.

19. By knowingly misrepresenting the scope of consumer products subject to an action under section 15 of the CPSA, PetSmart knowingly violated section 19(a)(13) of the CPSA, 15 U.S.C. § 2068(a)(13), as the term “knowingly” is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

20. Pursuant to section 20 of the CPSA, 15 U.S.C. § 2069, PetSmart is subject to civil penalties for its knowing violation of section 19(a)(13) of the CPSA, 15 U.S.C. § 2068(a)(13).

RESPONSE OF PETSMART

21. PetSmart's settlement of this matter does not constitute an admission of staff's charges in paragraphs 4 through 20 above.

22. Between November 2013 and January 2014, PetSmart corresponded with CPSC staff regarding certain Fish Bowl incidents. In this correspondence, PetSmart clearly stated that it first began selling the Fish Bowls in 2009. PetSmart also stated that it believed any product issues were limited to Fish Bowls manufactured for sale in 2013. CPSC staff did not ask PetSmart anything further regarding PetSmart's determination that the issues were limited to Fish Bowls sold between February 2013 and September 2013.

23. Following this correspondence, in January 2014, PetSmart provided the Commission with its report under section 15(b) of the CPSA, 15 U.S.C. § 2064(b) concerning PetSmart's receipt of complaints and incident reports about the Fish Bowls. PetSmart's report provided information related only to Fish Bowls manufactured for sale in 2013, consistent with its communications to CPSC staff. CPSC staff did not ask PetSmart anything further regarding Fish Bowls sold prior to 2013.

24. On April 24, 2014, in conjunction with the Commission, PetSmart voluntarily announced a recall of Fish Bowls sold at PetSmart between February 2013 and September 2013.

25. PetSmart conducted the April 24, 2014, voluntary recall of the Fish Bowls, as well as the section 15(b) reporting, out of an abundance of caution and without PetSmart having concluded that the Fish Bowls contained a defect, posed a substantial product hazard, or created an unreasonable risk of serious injury or death.

26. On November 17, 2015, in conjunction with the Commission, PetSmart voluntarily expanded the recall of Fish Bowls to include units sold at PetSmart between March

2010 and February 2013. PetSmart disputes Staff's allegation that PetSmart had information that the Fish Bowls manufactured prior to 2013 contained a defect and created an unreasonable risk of serious injury.

27. PetSmart denies Staff's allegations that PetSmart knowingly misrepresented the scope of consumer products subject to an action under section 15 of the CPSA and that PetSmart knowingly violated section 19(a)(13).

AGREEMENT OF THE PARTIES

28. Under the CPSA, the Commission has jurisdiction over the matter involving the Fish Bowls and over PetSmart.

29. The parties enter into the Agreement for settlement purposes only. The Agreement does not constitute an admission by PetSmart or a determination by the Commission that PetSmart violated the CPSA's reporting requirements.

30. In settlement of staff's charges, and to avoid the cost, distraction, delay, uncertainty, and inconvenience of protracted litigation or other proceedings, PetSmart shall pay a civil penalty in the amount of four million, two hundred fifty thousand dollars (\$4,250,000) within thirty (30) calendar days after receiving service of the Commission's final Order accepting the Agreement. All payments to be made under the Agreement shall constitute debts owing to the United States and shall be made by electronic wire transfer to the United States via: <http://www.pay.gov>, for allocation to, and credit against, the payment obligations of PetSmart under this Agreement. Failure to make such payment by the date specified in the Commission's final Order shall constitute Default.

31. All unpaid amounts, if any, due and owing under the Agreement, shall constitute a debt due and immediately owing by PetSmart to the United States, and interest shall accrue and

be paid by PetSmart at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b) from the date of Default, until all amounts due have been paid in full (hereinafter “Default Payment Amount” and “Default Interest Balance”). PetSmart shall consent to a Consent Judgment in the amount of the Default Payment Amount and Default Interest Balance, and the United States, at its sole option, may collect the entire Default Payment Amount and Default Interest Balance, or exercise any other rights granted by law or in equity, including, but not limited to, referring such matters for private collection, and PetSmart agrees not to contest, and hereby waives and discharges any defenses to, any collection action undertaken by the United States, or its agents or contractors, pursuant to this paragraph. PetSmart shall pay the United States all reasonable costs of collection and enforcement under this paragraph, respectively, including reasonable attorney’s fees and expenses.

32. After staff receives this Agreement executed on behalf of PetSmart, staff shall promptly submit the Agreement to the Commission for provisional acceptance. Promptly following provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the *Federal Register*, in accordance with the procedures set forth in 16 C.F.R. § 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date the Agreement is published in the *Federal Register*, in accordance with 16 C.F.R. § 1118.20(f).

33. This Agreement is conditioned upon, and subject to, the Commission’s final acceptance, as set forth above, and it is subject to the provisions of 16 C.F.R. § 1118.20(h). Upon the later of: (i) Commission’s final acceptance of this Agreement and service of the

accepted Agreement upon PetSmart, and (ii) the date of issuance of the final Order, this Agreement shall be in full force and effect, and shall be binding upon the parties.

34. Effective upon the later of: (i) the Commission's final acceptance of the Agreement and service of the accepted Agreement upon PetSmart, and (ii) and the date of issuance of the final Order, for good and valuable consideration, PetSmart hereby expressly and irrevocably waives and agrees not to assert any past, present, or future rights to the following, in connection with the matter described in this Agreement: (i) an administrative or judicial hearing; (ii) judicial review or other challenge or contest of the Commission's actions; (iii) a determination by the Commission of whether PetSmart failed to comply with the CPSA and the underlying regulations; (iv) a statement of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.

35. PetSmart represents and agrees that it has enhanced its compliance program to ensure compliance with the CPSA with respect to any consumer product imported, manufactured, distributed or sold by the Firm and will maintain said compliance program. PetSmart represents that the ongoing compliance program contains: (i) written standards, policies and procedures including those designed to ensure that information that may relate to or impact CPSA compliance (including information obtained by quality control personnel) is conveyed effectively to personnel responsible for CPSA compliance, whether or not an injury is referenced; (ii) a mechanism for confidential employee reporting of compliance-related questions or concerns to either a compliance officer or to another senior manager with authority to act as necessary; (iii) effective communication of company compliance-related policies and procedures regarding the CPSA to all applicable employees through training programs or otherwise; (iv) management oversight of and responsibility for compliance; and (v) retention of all CPSA

compliance-related records for at least five (5) years, and availability of such records to staff upon reasonable request.

36. PetSmart represents and agrees that it has designed and implemented internal controls and procedures designed to ensure that, with respect to all consumer products imported, manufactured, distributed or sold by PetSmart: (i) information required to be disclosed by PetSmart to the Commission is recorded, processed and reported in accordance with applicable law; (ii) all reporting made to the Commission is timely, truthful, complete, accurate and in accordance with applicable law; and (iii) prompt disclosure is made to PetSmart's management of any significant deficiencies or material weaknesses in the design or operation of such internal controls that are reasonably likely to affect adversely, in any material respect, PetSmart's ability to record, process and report to the Commission in accordance with applicable law.

37. Upon reasonable request of staff, PetSmart shall provide written documentation of its internal controls and procedures, including, but not limited to, the effective dates of the procedures and improvements thereto. PetSmart shall cooperate fully and truthfully with staff and shall, upon reasonable notice make available all non-privileged information and materials, and personnel with direct involvement in such procedures and deemed necessary by staff to evaluate PetSmart's compliance with the terms of the Agreement.

38. The parties acknowledge and agree that the Commission may publicize the terms of the Agreement and the Order.

39. PetSmart represents that the Agreement: (i) is entered into freely and voluntarily, without any degree of duress or compulsion whatsoever; (ii) has been duly authorized; and (iii) constitutes the valid and binding obligation of PetSmart, enforceable against PetSmart in accordance with its terms. PetSmart will not directly or indirectly receive any reimbursement,

indemnification, insurance related payment, or other payment in connection with the civil penalty to be paid by PetSmart pursuant to the Agreement and Order. The individuals signing the Agreement on behalf of PetSmart represent and warrant that they are duly authorized by PetSmart to execute the Agreement.

40. The signatories represent that they are authorized to execute this Agreement.

41. The Agreement is governed by the laws of the United States.

42. The Agreement and the Order shall apply to, and be binding upon, PetSmart and each of its successors, transferees, and assigns; and a violation of the Agreement or Order may subject PetSmart, and each of its successors, transferees, and assigns, to appropriate legal action.

43. The Agreement and the Order constitute the complete agreement between the parties on the subject matter contained therein.

44. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. For purposes of construction, the Agreement shall be deemed to have been drafted by both of the parties and shall not, therefore, be construed against any party, for that reason, in any subsequent dispute.

45. The Agreement may not be waived, amended, modified, or otherwise altered, except as in accordance with the provisions of 16 C.F.R. § 1118.20(h). The Agreement may be executed in counterparts.

46. If any provision of the Agreement or the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and the Order, such provision shall be fully severable. The balance of the Agreement and the Order shall

remain in full force and effect, unless the Commission and PetSmart agree in writing that severing the provision materially affects the purpose of the Agreement and the Order.

(continued on next page)

PETSMART, INC.

Dated: October 28, 2016

By: _____
Michael J. Massey
President and Chief Executive Officer
PetSmart, Inc.

Dated: October 28, 2016

By: _____
Jeffrey B. Margulies, Esq.
Norton Rose Fulbright US LLP
Counsel to PetSmart, Inc.

U.S. CONSUMER PRODUCT SAFETY
COMMISSION

Mary T. Boyle
General Counsel

Mary B. Murphy
Assistant General Counsel

Dated: October 27, 2016

By: _____
Philip Z. Brown
Trial Attorney
Division of Compliance
Office of the General Counsel

Provisionally accepted and provisional Order issued on the 14th day of November, 2016.

BY ORDER OF THE COMMISSION:

Todd A. Stevenson, Secretary
U.S. Consumer Product Safety Commission

[FR Doc. 2016-27644 Filed: 11/16/2016 8:45 am; Publication Date: 11/17/2016]